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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 641

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

APPELLANT'S REPLY MEMORANDUM

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The appellees, Interstate Commerce Commission, Seaboard Air Line Railroad Company, and Atlantic Coast Line Railroad Company have moved to affirm summarily the judgment of the District Court in Appeals Nos. 638, 639 and 641. The Solicitor General, on behalf of the United States, has filed a memorandum suggesting that the case is one which warrants plenary consideration by this Court. The memorandum of the Solicitor General urges that the Commission's findings with respect to the anticompetitive consequences of the merger are seriously deficient with regard to both the Southeast as a whole and central and western Florida. The Solicitor General also

points to the error inherent in the Commission's assumption that the adverse effects of the Florida monopoly created by the merger would be largely offset by competition from other modes of transportation.

Aside from the errors on the part of the Commission in dealing with the anticompetitive aspects of the merger throughout the southeast as a whole, and aside from the other errors of the Commission, all discussed in our jurisdictional statement, Southern believes it would serve a useful purpose to reply briefly to the appellees' contentions concerning the adequacy of the Commission's findings as to the anticompetitive aspects of the merger in central and western Florida and in the carriage of long-haul, bulk-loading commodities.

Appellees argue that the Commission applied proper standards and made adequate findings based on substantial evidence in performing its duty "to estimate the scope and appraise the effects of the curtailment of competition" cause by the merger, and appellees argue that any suggestion that the Commission is required to make a more meaningful analysis of the anticompetitive effects of the merger is but an argument that the Commission must apply Section 7 of the Clayton Act standards in a merger proceeding. I.C.C. 8-9; SAL-ACL 17, 25.)[1]

There is no dispute and no issue in the case that it is the Commission that has been designated by Congress to determine public interest. The Commission is the agency which must balance the adverse competitive effects of a merger against the benefits and determine whether the benefits outweigh the anticompeti-

[1] References such as this are to the page numbers of the Motions to Affirm filed by the ICC and the merging railroads.

tive consequences. This function is properly performed when the Commission applies proper standards and makes adequate findings based on substantial evidence. Southern also agrees that the Commission need not determine whether Section 7 of the Clayton Act is violated by the merger nor is the Commission restricted to the application of Section 7 standards alone in appraising the anticompetitive effects of the merger.

However, we submit that it is equally clear that the Commission cannot determine public interest without first making a proper and meaningful determination of the anticompetitive effects of the merger. The Commission must evaluate the extent of the anticompetitive effects in order to determine what this Court termed the ultimate question—"whether the merger would be consistent with the public interest despite the foreseeable injury to competition." 382 U.S. 154, 156 (1965). Until the Commission makes some estimate of the magnitude and analysis of the effects of the injury to competition it cannot possibly determine whether it is in the public interest to allow such injury. We agree with the Solicitor General that the Commission failed even to attempt such an estimation, particularly with regard to the anticompetitive effects of the merger in central and western Florida and with respect to the carriage of bulk commodities in which the railroads have a substantial inherent advantage over other modes of transportation.

The appellees contend that to require the Commission to do more than make the obvious finding that "monopoly" will exist in central and western Florida and that there will be a "significant" reduction of rail competition in Florida is to compel the Commission to utilize the "product and market" analysis of anti-

trust cases. (I.C.C. 10, SAL-ACL 25-27.) While such an analysis would undoubtedly have revealed the scope and effects of the merger, this argument, we believe, grossly overstates the consequences of requiring the Commission to do more than merely apply such labels to the competitive consequences of a merger that will eliminate for all time rail competition in this important freight-generating area of the country. We submit that, completely aside from antitrust analysis, the Commission under *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87 (1944), must "estimate the scope and appraise the effects" of the reduction of competition. The Commission does not comply with this responsibility simply by labelling the reduction of competition as "monopoly" or as "significant" (320 I.C.C. at 165, 166), without making some measurement and giving some indications in findings as to the scope or magnitude and possible effects of the reduction. The Commission certainly does not appraise the effects of the monopoly, as required by *McLean,* by the cryptic finding that the monopoly created would "merely" supplant the "duopoly" presently existing in central and western Florida. (320 I.C.C. at 165.) Nor does the Commission appraise the effects of monopoly by its finding that the existing two-carrier competition (termed "duopoly") has not had appreciable adverse competitive effects upon the communities or the shipping public."[2] (320 I.C.C. at 165.) To as-

[2] The I.C.C. contends in its motion (I.C.C. 10) that the "effects upon communities or the shipping public" that would result from the rail monopoly were appraised by the Commission. This is not the case. The Commission's finding quoted in part by the I.C.C. in its brief, dealt explicitly with the effects of presently existing two-carrier competition on the communities and the shipping public, not with the effects of the monopoly that would be created by the merger. (320 I.C.C. at 165.)

sume that, because two-carrier competition has not resulted in adverse effects, absolutely monopoly will likewise not result in adverse effects, is to ignore completely the benefits of competition and assumes that monopoly is as desirable as competition under the National Transportation Act. Such denigration of competition pervades the Commission's entire determination of public interest.

Appellees seek to support the lack of meaningful findings as to the scope and effects of the rail monopoly that will be created by the merger by pointing to the Commission's findings on intermodal competition. The I.C.C. contends that requiring the Commission to estimate the scope and appraise the effects of reduction of *rail* competition imposes an "antitrust approach" on the Commission. (I.C.C. 9-10.) Both the I.C.C. and the merging railroads point to the Commission's general findings on intermodal competition and to its somewhat more specific findings on phosphate rock to show that intermodal competition eliminates the need for an evaluation of rail competition in central and western Florida. (I.C.C. 9, SAL-ACL 26-27.)

Here, however, the argument leads the appellees to abandon the lower court decision which they seek to have affirmed. The lower court made it abundantly clear that "railroads have a decided economic advantage in carrying long-haul, heavy bulk products" (FEC App. p. 18a-19a) and that "railroads enjoy a decided economic advantage over all other modes of transport in heavy, long, bulk-haul products in central and western Florida." FEC App. p. 20a. The Commission itself, in a later merger case, recognized the importance of evaluating the scope and effects of the reduction of rail competition in relation to these commodities which are so dependent on rail transportation.

In the *Great Northern* case, Finance Docket No. 21478, . . . I.C.C. . . ., decided March 31, 1966 (mimeograph opinion), the Commission held that in "heavy loading, low-value bulk commodities" and in "many long haul movements", "rail transportation must be considered a distinctive market in its own right." Mimeo. opinion, p. 73. Furthermore, the lower court also rejected the argument made by the appellees before that court and now made in appellees' motions (I.C.C. 9, SAL-ACL 26-27), that water carriers supply a competitive mode of transport for phosphate rock and other bulk commodities and that such competition is evidenced by the railroads having had to reduce rates to meet such competition. The court dealt with this argument, stating that "the record in this case does demonstrate that barges are not physically interchangeable with railroads as a major competitive mode of phosphate transportation. Barges are not able to serve interior points on phosphate, nor are they able to serve facilities that have special equipment designed solely for loading or unloading rail shipments." FEC App. p. 20a. The court points to the fact that railroads are able to divert business from water carriers even though rail rates are substantially higher.[3] Thus, the attempt of the appellee railroads to urge the existence of "ubiquitous intermodal competition" (SAL-ACL 27, n. 20) in the carriage of these bulk commodities is completely at odds with the lower court's opinion and finds no support in findings in the Commission's report.

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[3] The Court also pointed out that the Commission's finding that the revenue per ton for the carriage of phosphate rock had declined between 1956 and 1960 "may only indicate that the railroads have priced themselves at a level where cross-elasticity of demand with other modes of carriage will take place." FEC App. p. 20a n. 28.

The appellee railroads, in their motion to affirm, inquire as to the purpose of requiring the Commission to make more specific findings as to the anticompetitive effects of this merger and imply that such a requirement is futile. (SAL-ACL 25.). While the Commission can approve a merger if it makes proper findings that the merger will be consistent with the public interest, one cannot assume that the Commission's balancing of the public interest would have been the same in the face of adequate findings which would have revealed the great magnitude of the reduction of competition being imposed by this merger. In any event, the Commission should be required to perform this function of balancing the benefits of the merger against the injury to competition with an awareness as to the scope and effects of the injury. It has not done so and it certainly cannot be assumed that a balancing accomplished after consideration of the scope and effects of the reduction of competition would bring about the same results as a balancing performed without such consideration.[4]

[4] As a result of a labor agreement just entered into between the unions and the merging carriers, basically an "attrition agreement," even the financial benefits, the "foremost" benefits of the merger (320 I.C.C. at 206-207), are thrown in serious doubt. It would appear that the balancing of public benefits against the foreseeable injury to competition has been substantially changed by the merging carriers. This is particularly true since the Commission had occasion to find in its report (320 I.C.C. at 201) that the cost of attrition provisions would be prohibitive, that it could not find that attrition was in the public interest and that attrition in this case was contrary to the National Transportation Policy. Surely this requires that the Commission, in making more meaningful findings on the anticompetitive effects of the merger, rebalance this with the now changed "benefits" to be derived from the merger.

There is a particularly compelling purpose in this case for requiring the Commission to consider and make findings concerning the scope and effects of the rail monopoly in central and western Florida and in the carriage of these few bulk loading commodities that are so important to that area and that account for more than 75 percent of the total tonnage of the two railroads. In this case, the Commission had available a means whereby it could approve the merger, give applicants nearly all of the benefits of merger and yet retain rail competition in that area in the carriage of such commodities. Southern opposed the merger unless it were conditioned on the merged carrier leasing or selling to Southern or some other qualified carrier a line of railroad between Jacksonville, Florida and central and western Florida. Had the Commission estimated the scope and appraised the effects of the rail monopoly to be created by the merger, its decision might well have been influenced as to whether to impose this condition in order to avoid the severe anticompetitive consequences that would have become apparent. Certainly, consideration by the Commission as to the scope and effects of this monopoly would have prevented the Commission from denying the condition primarily on the ground that providing competition with the merged carrier in this area would amount to an "invasion of territory" by Southern. (320 I.C.C. at 187, 209-210.)

The Commission in its motion to affirm ignores completely this basic justification given by the Commission for the denial of the condition and seeks instead to justify the Commission's denial on the grounds that the granting of the condition would cause "dismemberment of the merged company's lines, interfere with the

merged company's planned economies, and in general frustrate the over-all objectives of the merger, all to the detriment of the public interest." (I.C.C. 14.) While it is clear from reading the Commission's report that these reasons are not "basic" to the Commission's determination, even the secondary reliance on them by the Commission is dissipated by an examination of the underlying facts. The Examiner's report shows that less than 25 percent of the alleged savings by the merged carrier would be eliminated by providing competition in this area. (Ex. Rep. fol. 78.) The merged company's lines would not be dismembered since Southern suggested that the merged company could continue to use the one line leased or sold under the proposed condition, and of course there are presently two and frequently more parallel lines in this area owned by the two railroads. The over-all objectives of the merger could not possibly be frustrated since the merged carriers could nevertheless consolidate facilities in central and western Florida as well as in the rest of the area in which they operate.[5] Indeed, the merged company can, without monopoly, obtain substantially all of the planned economies and benefits to be derived from the merger. Obviously, Southern's competition would deprive the merged company of some revenue on traffic originating and terminating in this area, but that is the goal of effective competition which, the Commission seems to forget, is to be considered a public benefit.

We submit that the motions to affirm filed by the I.C.C. and the private appellees should be denied and

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[5] Compare *Great Northern* case, *supra*, p. 6, where the Commission considered and found that very substantial savings could be realized without merger. Mimeo. opinion, p. 62.

the Court should note probable jurisdiction so that plenary consideration can be given to the important issues present in the case.

Respectfully submitted,

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